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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 1304

MORRIS BRAUER,

Petitioner,

—v.—

SUPREME COURT OF NEW JERSEY,

Respondent.

In the Matter of Morris Brauer, An Attorney at Law.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

PETITIONER'S REPLY BRIEF

Abraham Glasser
Attorney for Petitioner Morris Brauer
52 Eighth Avenue
New York, New York 10014

32 Case Press Inc., 421 Hudson St., N.Y.—ORegon 5-4540

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Without any fault of petitioner, this reply brief unfortunately will not be reaching the Court until literally the eve (or perhaps even the morning) of the Court's scheduled conference of June 2, 1967, where this case is listed for conference, as we are advised by the Clerk.*

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* On p. 2 of the Brief In Opposition it is stated that the Clerk of the New Jersey Supreme Court—whom we served with the petition for certiorari by mail on April 20, 1967, since there did not appear to be any counsel or attorney whom we could serve—did not understand until on or about May 26, 1967 that the copies of the petition for certiorari received by him constituted service on the respondent. In a communication to the Clerk of this Court under date of May 24, 1967, we enclosed a copy of a letter which we sent to the Clerk of the Supreme Court of New Jersey under date of May 24, 1967 in which we had reminded the latter Clerk that the entire situation of the service of our petition for certiorari on the Supreme Court of New Jersey as respondent herein had been brought to the attention of the Clerk of that Court within about ten days from the time of said service. Our only reason for mentioning these facts is to repel any possible suggestion that the late filing of respondent's brief in opposition herein, and the consequent "last minute" filing of this reply brief, are attributable to fault of the petitioner; we received the brief in opposition in the mail yesterday, May 31, 1967.

I. Respondent's suggestion that the by-passing of the Hudson County Ethics Committee in this case is supported by relevant precedent.

Central to our petition for certiorari herein is our contention that it was improper to by-pass the regularly established County Ethics Committee procedure, and that the record contains nothing by way of justification of such by-passing. In the Brief In Opposition, pp. 4-5, it is stated:

> "* * * Moreover, the Petitioner was not treated in a manner different from other attorneys who have been subjected to the disciplinary procedures of the New Jersey Supreme Court. Disciplinary matters have been referred to a Judge acting as a master, rather than to an Ethics Committee, on other appropriate occasions. See *e.g. In re Mattera,* 34 N.J. 259 (1961); *In re Wittreich,* 5 N.J. 79 (1950) [The record shows that Mr. Justice Brennan, then a Judge of the New Jersey Superior Court, sat as a Master for the Court in the *Wittreich* matter]."

By the item just quoted respondent is evidently suggesting that the whole central emphasis of our petition for certiorari fails, in that the New Jersey County Ethics Committee procedure is subject to some sort of altogether normal or routine by-passing through use instead of special judicial Masters "on * * * appropriate occasions". We must perforce concede that, if such is in fact the posture and the method normally or routinely observed in New Jersey disciplinary proceedings against attorneys, everything in our petition for certiorari which turns upon our contention to the contrary is, at least *pro tanto,* defeated.

But, the issue thus sought to be drawn by respondent—to the effect that there is nothing unusual about by-passing

the regularly established County Ethics Committee procedure in New Jersey disciplinary matters against attorneys —is simply not justified by the two cases cited in respondent's brief at pp. 4-5 as above quoted. The first of respondent's two cases, *In re Mattera,* 34 N.J. 259 [also reported in 168 A. 2d 38] (1961), is not in point at all, because that was a case of charges of judicial misconduct (fixing traffic tickets) against the Magistrate of the Municipal Court of the City of Wildwood, New Jersey; the County Ethics Committee procedure, in which lawyers sit in judgment of other lawyers, would understandably have to be by-passed in a case of charges of judicial misconduct.

As to the second of respondent's citations, *In re Wittreich,* 5 N.J. 79 [also reported in 74 A. 2d 258] (1950), the ground of distinction which we assert is even more notable, we must respectfully state, than the judicial-misconduct distinction which we have above suggested in regard to the *Mattera* case. Indeed, it is surprising that, in a Brief In Opposition filed in this Court by the Attorney General of a State acting as attorney for the highest Court of a State, the ground of distinction now to be mentioned was overlooked: The ground of distinction in respect to the *Wittreich* case, *supra,* is, simply, that at the times which were operative in the *Wittreich* case, *there did not exist the present New Jersey County Ethics Committee procedure, and hence it was, altogether understandably, normal and proper at that time that a Judicial Master procedure should have been used in the Wittreich case rather than a County Ethics Committee procedure.*

Coincident with the adoption of a new Constitution in New Jersey effective in 1948, a new system of rules of practice and procedure for the governance of the New

Jersey State Courts became effective September 15, 1948. The *Wittreich* decision, *supra,* involved a disciplinary matter in which the respondent attorney, Andrew O. Wittreich, was ordered on *July 28, 1949* to answer charges of professional misconduct (74 A. 2d at p. 259)*; Mr. Wittreich's hearing on these charges was held on *August 2, 3 and 4, 1949* (*ibid*), a second hearing was held on *December 20 and 21, 1949* (*id.,* p. 261), and a third hearing was held on *April 17 and 21, 1950* (*ibid*).** In other words, the hearings in the *Wittreich* matter became lodged, before the Judicial Master therein† not later than *July 28 or August 2, 1949.*

In the Brief In Opposition herein respondent offers the *Wittreich* case, then, as one of the only two instances cited by respondent—the other such instance having been the *Mattera* case which involved disciplinary charges of judi-

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* Incidentally, the Wittreich charges arose in Hudson County, New Jersey, the same "vicinage" as that involving petitioner Brauer herein. While it may transgress the bounds of "judicial notice" for this Court to take "notice" of the realities of New Jersey State politics, it may not be amiss to mention that "Hudson County matters" have tended, since the time of the political downfall of former Mayor Frank Hague of Jersey City, New Jersey, to be the subject of *"sui generis"* treatment in the thinking of both politicians and jurists in the State of New Jersey. But the question of whether such distinctive political and juridical attitudes concerning "Hudson County matters" in New Jersey are reconcilable with Federal Fourteenth Amendment standards of due process and equal protection may properly be raised before this Court, we believe, in a proper record setting, as we think is the case here.

** According to the Brief In Opposition herein, p. 5, these hearings in the *Wittreich* case were held before Mr. Justice Brennan of this Court, then a Judge of the New Jersey Superior Court, sitting as a Judicial Master in the Wittreich matter. Our specification, in the text, *supra,* of the dates of the hearings before the Judicial Master in the *Wittreich* case, is important for reasons which will shortly appear.

† See the preceding footnote.

cial misconduct against a municipal Magistrate—in which, supposedly, the New Jersey County Ethics Committee procedure was supplanted or by-passed by a Judicial Master procedure. In our petition for certiorari herein we ventured to state that we knew of no such applicable precedent for by-passing the County Ethics Committee procedure. Spurred by respondent's citation of the *Mattera* and *Wittreich* cases in the Brief In Opposition, we have further researched the situation for the purposes of this reply brief; and, as seen, the *Mattera* case is not in point at all, but, perhaps even more striking, the *Wittreich* case is not in point either, for the following reasons:

As above mentioned, a new system of Court rules in New Jersey became effective September 15, 1948 coincident with the then new State Constitution. The only provisions in those 1948 Court rules relating to discipline of attorneys were the following (Supreme Court Rules):

> "1:8-18. Discipline and Disbarment
>
> (a) Affidavits presented to the court for the purpose of obtaining a rule to show cause why the name of an attorney should not be stricken from the roll shall not be filed without an order of the court; and no such rule to show cause, if allowed, shall be actually entered until the court by special order so directs; and whenever such a rule, not entered, shall be discharged, no entry thereof shall be made and no papers shall be filed.
>
> (b) No person who shall be disbarred or suspended as an attorney-at-law shall, during the period of such disability, be permitted to practice as a counsellor-at-law.
>
> (c) No application for reinstatement by a person who has been disbarred or suspended as an attorney-

at-law shall be heard by the court unless ten days' notice thereof shall be given to the Chairman of the Grievance or Ethics Committee of the Bar Association which prosecuted the said disciplinary proceedings, and to the Chairman of the Grievance or Ethics Committee of the Bar Association of the County in which said person resides at the time of such application.

* * * * *

RULE 1:9. BAR ASSOCIATIONS AND LAWYERS' CLUBS

1:9-1. Procedure for Recognition

Any state or county bar association or lawyers' club shall be deemed to be a recognized bar association or lawyers' club within the intent of these rules through the entry of an order so designating it by this court.

1:9-2. Authorization of Ethics Committee

Any ethics committee of any state or county bar association or lawyers' club, which has been recognized as such by this court as provided in Rule 1:9-1, shall be deemed duly authorized within the intent of these rules if appointed or elected in accordance with the provisions of the constitution and by-laws of the recognized association or club.

1:9-3. Administration of Oaths by Ethics Committee

Any member of such committee is hereby authorized to administer oaths to all such witnesses as may appear or be brought before the committee.

1:9-4. Subpoenas for Witnesses Before Ethics Committee

(a) Upon the application or petition to him, by the chairman of the duly authorized ethics committee of

a county or state bar association or lawyers' club which has been recognized as such by this court, setting forth that in an investigation before it into the alleged unethical or improper conduct of an attorney or counsellor of this state, certain persons are material witnesses in said investigation and are residents of this state, any judge of the Superior Court may make an order awarding process of subpoena out of the court commanding such person or persons to appear before such ethics committee to give testimony and answer questions as required, and produce papers, documents, books and records concerning the matters and persons under investigation.

(b) Upon filing the order in the clerk's office of the Superior Court, the clerk shall issue process of subpoena under the seal of the Superior Court requiring such person or persons to appear and testify before the committee at a time and place named therein, and so from day to day until the examination of such person or persons shall be completed.

(c) The subpoena may also contain a direction that such person bring with him to the examination, any books, papers or documents therein mentioned, and the clerk shall issue under the seal of the Superior Court any further order in reference to the examination, appearance and production of books, papers or documents before the committee as the judge may direct.

1:9-5. Service of Subpoena; Fees of Witnesses

The process of subpoena authorized by Rule 1:9-4 shall be served in the same manner and be of the same force and effect as like process in civil actions in the Superior Court.

1:9-6. Disobedience to Subpoena; Penalty

(a) In case any person so summoned by subpoena issued as aforesaid shall refuse to obey the sub-

poena or any direction therein, or to give testimony, or to answer questions as required, or to produce any books, papers, documents or records as required, or in case any such person shall refuse to obey any order made by the judge as aforesaid, it shall be lawful for such committee, upon affidavits proving the facts, to apply to the judge of the Superior Court for a rule to show cause or an order of arrest against such person as for a contempt.

(b) The judge shall hear the application, and, if satisfactory proof be made of such refusal, shall issue an order, directed to the sheriff or any constable of the county, for the arrest of such person, and, upon his being brought before the judge, he shall proceed to a hearing of the cause.

(c) The judge shall have power to enforce, by imprisonment in the county jail, obedience to the subpoena, and the answering of any question that may be proper, and the production of any book, paper or document that the witness would be compelled to produce in a court of law, and also to compel the witness to pay the costs of said proceeding to be taxed by the judge.

(d) Any person who shall willfully and corruptly testify falsely to any material matter upon oath or affirmation administered by any member of such committee, upon the investigation or inquiry, shall be guilty of perjury."

Thus, the procedure established by the Court Rules newly effective in New Jersey as of September 15, 1948 contained no provisions for Court-appointment of any Ethics Committee and no comprehensive system for disciplining of attorneys by County Ethics Committees. The above-quoted new Court Rules effective September 15, 1948 referred only

to various, not necessarily officially recognized, pre-existing Ethics Committees or other Bar Association groups and to general variously pre-existing disciplinary powers of such County Committees or Bar groups, the only significantly or specifically spelled-out power of such groups under the new 1948 Rules being a power of subpoena; which is to say that, under the Court Rules made newly effective as of September 15, 1948 there did not exist in any sense a Court-appointed system of County Ethics Committees possessing anything resembling the comprehensive or indeed plenary powers for the disciplining of attorneys as set forth in the New Jersey Court Rules which were (or should have been) applicable to the case of the within petitioner Morris Brauer (see Appendix E to our within Petition for Certiorari, pp. A-55 to A-65, where we quote the presently operative New Jersey Supreme Court Rules 1:16 and 1:18).

If, then, the New Jersey Court Rules effective as of September 1948 did not establish a County Ethics Committee procedure in any manner remotely resembling the presently operative procedure, the following question becomes of immediate importance: At the operative times in the *Wittreich* case, *supra,* had the New Jersey Court Rules of September 15, 1948, been changed in any herein significant manner, so as to render respondent's citation of the *Wittreich* "precedent" appropriate? The answer appears to be unqualifiedly in the negative. Our research discloses that the only change in the applicable New Jersey Court Rules *of September 15, 1948,* which would affect the operative time-incidents in the *Wittreich* case were certain utterly non-significant changes in the Rules adopted *October 8, 1948* (details *infra*)—where as the reference to a Judicial Master (rather than to a County Ethics Committee) in the *Witt-*

reich case was made sometime between *June 23, 1949* (when the alleged misconduct of Mr. Wittreich commenced) and *July 28, 1949* (when Mr. Wittreich was ordered to answer charges of professional misconduct) (74 A. 2d at p. 259); and at those latter times the Rules had not been significantly changed. The above mentioned changes in the New Jersey Court Rules which were made *October 8, 1948* effected only a striking out, from the above quoted Rules 1:9-1 *et seq.* (effective September 15, 1948) of references to "lawyers' clubs" (see *Soney & Sage, Publishers, New Rules And Amendments To The Rules Governing The Courts of the State of New Jersey Adopted And Promulgated Subsequent To The Publication Of Volume I Of The Rules, p. 4* [no publication date stated, but evidently published in 1949, and containing amendments to the Rules to and including January 1, 1949]).

The next amendments affecting any aspect of the New Jersey Court Rules here in question, i.e., rules as to disciplining of attorneys or as to County Ethics Committees, etc., were adopted *November 10, 1949, which was several months after the operative dates in the Wittreich* case—where, as seen, the reference to a Judicial Master must have occurred not later than *July 28, 1949,* which was more than three months prior to the last mentioned amendments of the Rules adopted *November 10, 1949.* The amendments of *November 10, 1949 established, for the first time, the presently existing County Ethics Committee procedure,* i.e., the amendments of November 10, 1949 established for the first time a systematic procedure for Court-appointed County Ethics Committees with comprehensive disciplinary powers. Those amendments of November 10, 1949 are printed in 3 N.J. 635-642.

Thus, we respectfully repeat, there was not in existence, at the operative times in the *Wittreich* case, anything resembling the present New Jersey County Ethics Committee procedure, so that the reference in that case to a Judicial Master has no significance, for present purposes, as instancing a "precedent" (as claimed by respondent) for the by-passing of the County Ethics Committee procedure of which we herein complain.

II. The question of jurisdiction.

Respondent's principal thrust in the Brief In Opposition is that our Federal certiorari isssues are not timely because our petition for rehearing in the Supreme Court of New Jersey was not effective to lodge the Federal issues in this record. We note that the Supreme Court of New Jersey did not take, or in any way signify, any such position, in passing on our petition for rehearing (in which we fully spelled out the very same jurisdictional problem now urged by the Attorney General of New Jersey in his Brief In Oposition); and we seriously and respectfully question whether the Brief In Opposition by the Attorney General of New Jersey may rightfully or properly be taken as denoting any sort of authoritative "position" or "ruling" or "statement of State law by the highest Court of the State" on this question of the Federal certiorari jurisdiction of this Court. We take it, rather, that the question of certiorari jurisdiction will be independently considered by this Court. See *Stern & Gressman, Supreme Court Practice,* 3rd Ed., §3-19 (pp. 85-86).

CONCLUSION

It is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

ABRAHAM GLASSER
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